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85-747

NO.

Supreme Court, U.S.
FILED
OCT 21 1985
JOSEPH F. SPANIOL, JR.
CLERK

in the Supreme Court of the United States

OCTOBER TERM, 1985

CHARLES LEROY TIMBERLAKE,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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37P

QUESTION PRESENTED FOR REVIEW

1. Whether the Petitioner's guilty pleas to two conspiracies, one under the General Conspiracy Statute, 18 USC Section 371, by conspiring to import cocaine, and the other plea to a Specific Conspiracy Statute 18 USC Section 963, by conspiring to import cocaine, in violation of 21 USC Section 952(a) violated Petitioner's rights under the double jeopardy clause of the Fifth Amendment to the Constitution of the United States of America.

STATUTES INVOLVED

21 USC Section 963:

"Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine, or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt of conspiracy."

18 USC Section 371:

"If two or more persons conspire either to commit any offense against the United States . . . and one or more of such persons do any act to affect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than 5 years or both."

21 USC Section 952(a):

Proscribes the substantive offence of importation of cocaine.

LIST OF INTERESTED PERSONS

The only persons having an interest in this case are the Petitioner, his family, and the United States of America.

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NO.

in the Supreme Court of the United States

OCTOBER TERM, 1985

CHARLES LEROY TIMBERLAKE,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner, CHARLES LEROY TIMBERLAKE, respectfully prays that a Writ of Certiorari issue to review the judgement of the United States Court of Appeals for the Tenth Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals was published and filed by that Honorable Court on July 23, 1985. (App. A, *infra*)

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered July 23, 1985. The Petition is filed within the authorized time period. Jurisdiction is invoked under 28 USC Section 1254(1).

STATEMENT OF THE CASE

On July 27, 1983, Petitioner Timberlake was indicted with six co-defendants, not parties to this Petition, on charges surrounding a conspiracy to import cocaine and conspiracy to travel in interstate and foreign commerce to promote the importation of cocaine. Timberlake pled guilty to charges of violating 18 USC Section 1952(a)(3) by traveling in interstate commerce to promote importation of cocaine; 18 USC Section 371 by conspiring to travel in interstate commerce to promote the importation of cocaine in violation of 18 USC Section 1952(a)(3); and 21 USC Section 963 by conspiring to import cocaine in violation of 21 USC Section 952(a).

The United States District Court for the Eastern District of Oklahoma accepted guilty pleas from the Petitioner on September 2, 1983 and on October 26, 1983 sentenced the Petitioner to 25 years imprisonment. Petitioner Timberlake retained new counsel and launched a collateral attack on his sentence by means of motions to vacate them pursuant to 28 USC Section 2255. However, the District Court denied the motion on 25 September, 1984. From the aforesaid denial the Petitioner appealed to the United States Court of Appeals for the Tenth Circuit.

Petitioner has contended throughout that his conviction on multiple conspiracy grounds, one on a general conspiracy statute and the other on a specific drug act conspiracy statute violated his rights under the double jeopardy clause of the United States Constitution, Fifth Amendment.

This argument and others advanced by Petitioner was rejected by the Tenth Circuit, on 23 July 1985 in a two to one (2—1) decision. This petition has raised the constitutional question as to whether or not the appellant's guilty pleas under both the general and specific conspiracy statutes has violated his rights under the double jeopardy clause. Petitioner claims that his rights have been so violated and that his plea and sentences should be vacated because the charges to which he pled guilty constitute the same offense, and therefore he is being punished twice for the same offense in violation of the double jeopardy clause.

REASONS FOR GRANTING THE WRIT

THE PETITIONER'S RIGHTS UNDER THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT ARE VIOLATED IF HIS GUILTY PLEA TO THE GENERAL CONSPIRACY STATUTE, 18 USC SECTION 371, AND HIS GUILTY PLEA TO THE SPECIFIC CONSPIRACY STATUTE UNDER THE DRUG CONTROL ACT, 21 USC SECTION 963, ARE BOTH ALLOWED TO STAND.

This case presents an important constitutional question under the double jeopardy clause of the Fifth Amendment, warranting review by this Court. This issue arises from the Tenth Circuit Court of Appeals holding, by a two to one (2—1) majority, that the Petitioner's guilty pleas under both the General Conspiracy Statute and the Specific Conspiracy Statute of the Drug Control Act does not violate his rights under the double jeopardy clause. This conclusion by the Court below is at odds with decisions of this Court and several other Courts of Appeals, as well as to the expressed intent of the United States Congress.

The Petitioner was indicted on numerous counts for conspiring to and actually transporting cocaine into the United States. He entered into a plea bargain with the government as a result of which he pled guilty to charges of violating 18 USC Section 1952(a)(3) by traveling in interstate commerce to promote importation of cocaine; 18 USC Section 371, the General Conspiracy Statute by conspiring to travel in interstate commerce to promote the importation of cocaine in violation of 18 USC Section 1952(a)(3); and 21 USC Section 963, the Specific Conspiracy

Statute, by conspiring to import cocaine in violation of 21 USC Section 952(a).

Petitioner claims that his plea and sentence should be vacated because the charges to which he pled guilty constitute the same offense, and therefore that he is being punished twice for the same offense in violation of the double jeopardy clause.

The Petitioner cannot be validly convicted under both the General Conspiracy Statute and the Specific Conspiracy Statute contained in the Drug Control Act. As this Court has stated, the gist of the crime of conspiracy is the agreement of the conspirators to commit one or more unlawful acts. *Braverman vs. United States*, 317 US49, 53 (1942). The Court stated:

> "Whether the object of a single agreement is to commit one or many crimes, it is in either case that agreement which constitutes the conspiracy which the statute punishes. The one agreement cannot be taken to be several agreements, and hence several conspiracies because it envisages the violation of several statutes rather than one."

In the instant case, Petitioner and his confederates were charged with a single conspiracy which involved violation of the Drug Laws. In carrying out the conspiracy they may have violated a number of substantive laws, but the conspiracy is a single offense presumptively, and subject to a single penalty.

Case law recognizes exceptions to this rule when a single conspiracy violates two statutes. The basis being

the position that Congress can make a single agreement two offenses and punish it twice if it so desires. *Albernez vs. United States*, 450 US 333 (1981); *American Tobacco Corp. vs. United States*, 328 USC 781 (1946).

However, *Albernez* and *American Tobacco* are quickly distinguished because the conspiracies therein involved were violations of two *specific* conspiracy statutes. In *Albernez* the conspiracy had as its aims both the importation and distribution of a controlled substance. Congress had enacted specific statutes making it a crime to violate the substantive provisions of the Drug Control Act regarding importation, 21 USC Section 961, and to conspire to violate the substantive provisions of the Drug Control Act regarding distribution, 21 USC Section 843. The Court reasoned that the two statutes require proof of different objectives of the conspiracy and that Congress had clearly intended to make the single conspiracy, which included both of those aims, subject to cumulative punishment. The rationale of the Court in *American Tobacco* was similar.

In the instant case, Petitioner was not convicted of violating two specific conspiracy statutes, but of violating a specific conspiracy statute and also of violating the General Conspiracy Statute. Case law has made clear that rules of statutory construction, indicate that where specific conspiracy statutes have been enacted, Congress has presumed to have intended to replace the General Conspiracy Statute not to supplement it. *United States vs. Corral*, 578 F.2d 570, 572, (5th Cir. 1978); *United States vs. Marotta*, 518 F.2d 681, 684 (9th Cir. 1975); *United States vs. Mori*, 444 F.2d 240, 245 (5th Cir. 1971), Cert. Denied 404 US 913 (1971).

Federal case law sustains this point of view. *Enzor vs. United States*, 262 F.2d 172 (5th Cir. 1958) held that, where a conspiracy to violate the drug laws is involved, that a defendant must be sentenced under the specific drug conspiracy statute rather than under the general conspiracy statute. This indicated that when Congress enacted Sections 963 and 846 it intended that a conspiracy to violate the drug laws should be punished under those specific statutes rather than under the general conspiracy statute. This view is supported by the legislative history of the Drug Control Act which states that one of its principal reasons was to provide "for an overall balanced scheme of criminal penalties for offenses involving drugs." H.R. Rep. NO. 91-1444, Reprinted 1970 USC Cong. and Ad. News 4566, 4567.

Congress clearly did not intend to create separate offenses when it enacted Section 371 and Sections 963 and 846. Congress intended to make it easier to prove drug conspiracies by not requiring proof of an overt act in Sections 963 and 846, although proof of an overt act was required in Section 371. The congressional intent was to punish drug conspiracies more harshly than other types of conspiracies.

Congress is presumed to intend a Specific Conspiracy Statute to replace rather than to supplement a General one, *Mori* 444 F.2d at 245.

A single agreement under existing interpretation of the conspiracy cases cannot make a petitioner guilty of as many offenses as the agreement has criminal objects. This is the holding of *Braverman, supra*, unless Congress has made conspiracy to commit those particular

offenses specific crimes, and therefore expressing its intent that the single conspiracy can be considered more than one offense.

Under the holding of the Court of Appeals below, a conspiracy such as the instant one, with only one objective, importation of drugs in violation of Section 952(a) would constitute two offenses if one of the conspirators committed an overt act in furtherance of the conspiracy. Therefore, if such were the case, when one had proved a violation of Section 371, one would necessarily have proved a violation of Section 963 as well. This certainly was never the intent of Congress, and is clearly inconsistent with *Braverman*, a case not cited by the majority below.

The defendants in *Braverman* were indicted on seven counts under the section of the criminal code predecessor to Section 371. Although each count charged conspiracy to violate a separate internal revenue law, the Court found the multiple convictions violated the double jeopardy clause since, "it is the conspiracy which is the crime however diverse its objects." 317 US at 54.

The decision of the Court below sought to avoid the double jeopardy clause and the double jeopardy problem by taking the diverse objects of the conspiracy and dividing them among different conspiracy statutes. This cannot be done constitutionally unless those statutes, by themselves, create separate offenses.

A single conspiracy such as the one in the instant case can be punished more than once only when Congress has indicated its intent to do so by enacting two specific

conspiracy statutes which, in and of themselves, satisfy the test for creation of two separate offenses.

In situations where Congress intended to create two different offenses, the presumption exists that it intended to permit cumulative sentences. In the instant case, however, the statutory provisions involved proscribe the same offense and have been construed not to authorize cumulative punishments in the absence of clear legislative intent to the contrary. *Missouri vs. Hunter*, 459 US 359, 366 (1983); *Whalen vs. United States*, 445 US 684, 691-92 (1980).

In the cause at bar there is no clear indication that Congress intended to punish drug conspiracies under both the Specific and General Conspiracy Statutes, and the presumption then rises that it did not intend cumulative punishment. In the instant cause multiple punishments for a single conspiracy are violative of the double jeopardy clause.

CONCLUSION

For the above stated reasons, a Writ of Certiorari should issue to review the judgment and opinion in the instant cause of the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18 day of October, 1985, three copies of the Petition for Writ of Certiorari were delivered by mail to the Solicitor General of the United States, Department of Justice, Washington, D.C. 20530 and to the office of the United States Attorney, Courthouse, P.O. Box 607, Muskogee, Oklahoma 74401.

THOMAS H. CONNORS

Thomas H. Connors, Esquire

Appendix

[FILED JUL 23 1985]

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 84-2563
2564
(D.C. Nos. 84-368-C and 84-369-C
(East. Dist. Oklahoma)

CHARLES LEROY TIMBERLAKE and
MITCHELL SKIFF ENGELHART,
Plaintiffs-Appellants

v.

UNITED STATES OF AMERICA,
Defendant-Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

(D.C. Nos., 84-368-C and 84-369-C)

Thomas H. Connors, Miami, Florida,
Attorney for Plaintiffs-Appellants.

Donn F. Baker, United States Attorney, Eastern District of Oklahoma, Paul G. Hess, Assistant United States Attorney, Eastern District of Oklahoma, Muskogee, Oklahoma *for Defendant-Appellee*

Before McKAY, DOYLE and LOGAN Circuit Judges.

DOYLE, Circuit Judge.

After examining the briefs and the appellate record, this three-judge panel has determined that oral argument would not be of material assistance in the determination of this appeal. *See* Fed.R.App.P. 34(a); Tenth Circuit R. 10(e). The cause is therefore ordered submitted without oral argument.

Appellants Mitchell Skiff Engelhart and Charles Leroy "Chuck" Timberlake, airplane pilots by trade, became involved in a summer 1983 drug run from Colombia. On June 30, 1983, Engelhart and Timberlake left Grand Prairie, Texas, in a twin-engine Cessna Titan airplane. They flew to an isolated airfield in Colombia, where they picked up 23 duffel bags containing approximately 460 pounds of 97 percent pure cocaine. They flew to an isolated airfield located near Talihina, in the Eastern District of Oklahoma. They arrived at about 3:35 a.m., CDT, on July 1, 1983. The cocaine was removed from the plane. Appellants then flew to Dallas-Fort Worth, Texas, where they were arrested later that day. Engelhart had an understanding that he would be paid $175,000 for this flight; Timberlake was to be paid $70,000.

Appellants were indicted by a federal grand jury in the Eastern District of Oklahoma on July 27, 1983. This was for their transportation of the drugs as part of a conspiracy. Timberlake was indicted on six specific counts; Engelhart was indicted on seven. Both appellants entered into plea agreements with the United States Attorney whereby each pleaded guilty to three counts of the indictments and agreed to cooperate with the government in connection with the prosecution of the other conspirators. No promises were made by the government as to the sentences that appellants would

receive. The government's only promise was to bring appellants' cooperation to the attention of the court at the time of sentencing. Both the government and the appellants kept their portions of the bargain.

The United States District Court for the Eastern District of Oklahoma, after ascertaining that there was a sufficient factual basis for appellants' guilty pleas and determining that the pleas were knowingly and voluntarily entered, accepted the guilty pleas on September 2, 1983. On October 26, 1983, the court sentenced each appellant to twenty-five years imprisonment. Appellants retained new counsel and launched collateral attacks on their sentences by means of motions to vacate them pursuant to 28 U.S.C. §2255. However, the district court denied their motions in memorandum opinions and judgments which were issued September 25, 1984 to Timberlake, and on September 27, 1984 to Engelhart. These appeals are from the district court's denial of the motions under §2255.

Appellants have advanced several arguments in support of their appeal. Both of them argue that their convictions on multiple conspiracy counts violate the double jeopardy clause of the Fifth Amendment. The appellants also contend that they were denied effective assistance of counsel in violation of the Sixth Amendment. A final contention from appellant Engelhart maintains that the district court failed to ascertain whether there was a factual basis for his guilty pleas to Counts 3 and 5 of the indictment. We are unable to find any merit in any of appellants' arguments and thus affirm the district court's denial of their §2255 motions.

We now address ourselves to the contention that there was double jeopardy which voids the pleas of guilty. Engelhart pleaded guilty to conspiracy to import cocaine in violation of 21 U.S.C. §963, conspiracy to distribute cocaine in violation of 21 U.S.C. §846, and conspiracy to travel in interstate and foreign commerce with intent to promote an unlawful activity contrary to 18 U.S.C. §371. Appellant Timberlake pleaded guilty to the conspiracy counts. He was charged with violating 21 U.S.C. §963 and 18 U.S.C. §371. The appellants now contend that there was but a single conspiracy, and that imposition of several punishments for that single conspiracy under several statutes violates the double jeopardy clause.

We disagree with this contention. It is settled that a single illegal transaction may be punished under several statutory provisions if conviction under each statutory provision requires proof of a fact not required for conviction under the other statutory provisions. *Blockburger v. United States*, 284 U.S. 299, 304 (1932). After all, these are separate and distinct violations, the conspiracy and the actual carrying out of the conspiracy. This double jeopardy test focuses on the elements of the crimes, and not on the specific acts charged in the indictment or the evidence presented at trial. *United States v. Rodriquez*, 612 F.2d 906, 919 (5th Cir. 1980), *aff'd. sub nom., Albernaz v. United States*, 450 U.S. 333 (1981); *see also United States v. Solano*, 605 F.2d 1141 (9th Cir. 1979), *cert. denied*, 444 U.S. 1020 (1980); *United States v. Peterson*, 524 F.2d 167 (4th Cir. 1975), *cert. denied*, 423 U.S. 1088 (1976). It is also settled that a single illegal activity may be punished under two distinct and specific conspiracy statutes, *see American Tobacco Co. v. United States*, 328 U.S. 781 (1946), or

under the general conspiracy statute (18 U.S.C. §371) and a more specific conspiracy statute, *United States v. Barton*, 647 F.2d 224 (2d Cir.), *cert. denied*, 454 U.S. 857 (1981).

When one applies the rulings in the authorities which are set forth above, we can see that those convictions do not violate any double jeopardy clause. The Supreme Court has already ruled that a single conspiracy may support convictions under both 21 U.S.C. §963 and 21 U.S.C. §846. *Albernaz v. United States*, 450 U.S. 333, 339 (1981). The holding in *Albernaz* effectively disposes of one of appellant Engelhart's double jeopardy arguments. With respect to both appellants' double jeopardy challenges to convictions under both 18 U.S.C. §371 and 21 U.S.C. §963, we find that the elements of proof under the two statutes diverge sufficiently that a single conspiracy can support separate violations of the two statutes. 18 U.S.C. §371 requires proof of an overt act in furtherance of the conspiracy. *See, e.g., United States v. Sterkel*, 430 F.2d 1262, 1263 (10th Cir. 1970). The Fifth Circuit has ruled that no overt act need to be proven in order to obtain a conspiracy conviction under 21 U.S.C. §963. *See, e.g., United States v. Pool*, 660 F.2d 547, 560 (5th Cir. 1981). Inasmuch as the elements required to prove conspiracies under the two statutes diverge, they constitute separate offenses under the *Blockburger* test, and conviction of both offenses does not violate the double jepardy clause. Finally, with respect to appellant Engelhart's conviction of conspiracies under both 21 U.S.C. §846 and 18 U.S.C. §371, it is to be noted that the elements of proof once again diverge. Conviction on the §371 count requires proof of an element, intent to travel in interstate commerce to promote an unlawful activity. It does not

require the sustaining of a conviction for conspiracy unlawfully to distribute controlled substances under 21 U.S.C. §846. Consequently, Engelhart's conviction on both of these conspiracy counts does not bring the double jeopardy clause into action. *Cf. United States v. Stevens*, 612 F.2d 1226, 1231 (10th Cir. 1979), *cert. denied*, 447 U.S. 921 (1980). In summary, we find no merit to any of the appellants' double jeopardy arguments.

The next argument is that appellants were denied the effective assistance of counsel guaranteed to them by the Sixth Amendment during plea bargaining and at the time of sentencing. They maintain that their earler counsel did not advise them of proffered plea bargains more favorable than the ones that they ultimately accepted. They also contend that their counsel advised them to plead guilty to charges that violated the double jeopardy clause. This suggests that we must measure these contentions against our rule that "(t)he Sixth Amendment demands that defense counsel exercise the skill, judgment, and diligence of a reasonably competent defense attorney." *Dyer v. Crisp*, 613 F.2d 275, 278 (10th Cir. 1980) (en banc), *cert. denied*, 445 U.S. 945 (1980). When we consider appellants' arguments in light of this rule, we are compelled to reject them. We hold that appellants' Sixth Amendment right to effective representation was not infringed.

The appellants claim that their attorneys were approached by the United States Attorney and offered more advantageous plea bargains than those which they accepted. However, there is no evidence in the record to support such contentions. In fact, the affidavit of Donn F. Baker, the Assistant United States Attorney who handled this case, dispels that contention. No such

offers were ever made to the appellants' attorneys. If the U. S. Attorney had offered a more advantageous plea bargain that was not conveyed to the appellants, and no such offer is at all likely, it is doubtful whether this would justify our reversing these defendants' convictions. *See United States v. Geittmann*, 733 F.2d 1419, 1422 (10th Cir. 1984).

Finally, the appellants also claim that their attorneys' failure to develop double jeopardy arguments and advice that they plead guilty to counts that they now allege violated the double jeopardy clause shows the ineffectiveness of their earlier counsel. We find this argument to be without merit. As noted above, there is no legal support for the appellants' double jeopardy arguments. We must conclude, therefore, that trial counsel's failure to pursue those double jeopardy arguments at an earlier stage of this case does not add up to ineffective assistance of counsel.

We turn now to appellant Engelhart's final argument. His contention is that the district court failed to ascertain that there was a sufficient factual basis for his guilty plea. This, however, is without merit. The transcript shows that Engelhart's Rule 11 hearing was sufficient. The district court was correct in concluding there was a factual basis for Engelhart's guilty plea. Therefore, we reject Engelhart's argument.

Our conclusion is that the judgments below should be and they are affirmed.

CHARLES LEROY TIMBERLAKE and
MITCHELL SKIFF ENGELHART

v.

UNITED STATES OF AMERICA

Nos. 84-2563 and 84-2564

McKAY, Circuit Judge, concurring in part and dissenting in part:

The issue in this case is whether the appellants' guilty pleas under both a general and a specific conspiracy statute violate their rights under the double jeopardy clause.

The appellants were indicted on numerous counts for conspiring to and actually transporting approximately 460 pounds of 97 percent pure cocaine from Colombia to Oklahoma. Both appellants entered into plea bargains with the government. As a result, appellant Engelhart pled guilty to charges of violating 21 U.S.C. §963 by conspiring to import cocaine in violation of 21 U.S.C. §952; 21 U.S.C. §846 by conspiring to possess cocaine with intent to distribute in violate of 21 U.S.C. §841; and 18 U.S.C. §371 by conspiring to travel in interstate commerce to promote the importation of cocaine in violation of 18 U.S.C. §1952(a)(3). Appellant Timberlake pled guilty to charges of violating 18 U.S.C. §1952(a)(3) by traveling in interstate commerce to promote importation of cocaine; 18 U.S.C. §371 by conspiring to travel in interstate commerce to promote the importation of cocaine in violation of 18 U.S.C. §1952(a)(3); and 21 U.S.C. §963 by conspiring to import cocaine in violation

of 21 U.S.C. §952(a). Appellants now claim that the plea and sentences should be vacated because the charges to which they pled guilty constitute the same offense, and therefore they are being punished twice for the same offense in violation of the double jeopardy clause.

I agree with the majority that appellant Engelhart's conviction under both 21 U.S.C. §846 and 21 U.S.C. §963 does not violate the double jeopardy clause. *Albernez v. United States*, 450 U.S. 333 (1981). However, I cannot agree that the appellants validly may be convicted under both the general consipracy statute and the specific conspiracy statutes contained in the Drug Control Act. Accordingly, I must dissent.

As the Supreme Court has stated, the gist of the crime of conspiracy is the agreement or confederation of the conspirators to commit one or more unlawful acts. *Braverman v. United States*, 317 U.S. 49, 53 (1942). As the Supreme Court made clear:

> Whether the object of a single agreement is to commit one or many crimes, it is in either case that agreement which constitutes the conspiracy which the statute punishes. The one agreement cannot be taken to be several agreements and hence several conspiracies because it envisages the violation of several statutes rather than one.

Id.

In the present case, the appellants were charged with a single conspiracy—one involving violation of the drug laws. In the process of carrying out the

conspiracy, they would have violated a number of substantive laws. However, the conspiracy is presumptively a single offense and subject to a single penalty.

The court has since recognized an exception to this rule where a single conspiracy violates two statutes. *Albernez*, 450 U.S. 333; *American Tobacco Co. v. United States*, 328 U.S. 781 (1946). The rationale of these cases is that, if Congress so chooses, it can make the single agreement two offenses and punish it twice. However, the rules set forth in those cases are limited and cannot be used to validate imposition of punishment under both section 371 and section 963 or 846, such as occurred in this case.

In both *Albernez* and *American Tobacco* the conspiracy violated two *specific* conspiracy statutes. In *Albernez*, the conspiracy had as its aims both the importation and the distribution of a controlled substance. Congress has enacted specific statutes making it a crime to conspire to violate the substantive provisions of the Drug Control Act regarding importation, 21 U.S.C. §963, and to conspire to violate the substantive provisions of the Drug Control Act regarding distribution, 21 U.S.C. §846. The court thus found that, since the two statutes required proof of different objectives of the conspiracy, that Congress had clearly intended to make the single conspiracy which encompassed both of those aims subject to cumulative punishment.

Similarly, in *American Tobacco*, the defendant conspired to restrain trade and to monopolize. Congress has made each of those ends of the conspiracy subject to criminal punishment under section 1 and section 2 of

the Sherman Act. The court found that "section 1 and section 2 of the Sherman Act require proof of conspiracies which are reciprocally distinguishable from and independent of each other although the objects of the conspiracies may partially overlap." *American Tobacco*, 328 U.S. at 788.

In the present case, however, appellants were not convicted of violating two specific conspiracy statutes. Rather, each appellant was convicted of violating a specific conspiracy statute and also of violating the general conspiracy statute.[1] Under general rules of statutory construction, where specific conspiracy statutes have been enacted, Congress is presumed to have intended to replace the general conspiracy statute, not to supplement it. *United States v. Corral*, 578 F.2d 570, 572 (5th Cir. 1978); *United States v. Marotta*, 518 F.2d 681, 684 (9th Cir. 1975); *United States v. Mori*, 444 F.2d 240, 245 (5th Cir. 1971), *cert. denied*, 404 U.S. 913 (1971). Thus, when Congress enacted sections 963 and 846, it indicated that a conspiracy to violate the drug laws should be punished under those specific statutes *rather than* under the general conspiracy statutes. *See Enzor v. United States*, 262 F.2d 172 (5th Cir. 1958) (holding that, where a conspiracy to violate the drug laws is concerned, a defendant must be sentenced under the specific drug conspiracy statute rather than under the

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[1]Section 371 provides that:

> If two or more persons conspire either to commit an offense against the United States . . . and one or more of such persons do any acts to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

general conspiracy statute); *see also United States v. Bates*, 429 F.2d 557 (9th Cir.), *cert. denied*, 400 U.S. 831 (1970); *United States v. Afflerbach*, 754 F.2d 866 (10th Cir. 1985) (McKay, J., dissenting). This view is supported by the legislative history, which states that one of the principal purposes of the Drug Control Act was to provide "for an overall balanced scheme of criminal penalties for offenses involving drugs." H.R. Rep. No. 91-1444, *reprinted in* 1970 U.S. Code Cong. & Ad. News 4566, 4567.[2] Congress, therefore, did not intend to create separate offenses when it enacted section 371 and sections 963 and 846.

The majority ignores this rule of statutory construction and finds that the statutes describe different offenses under the test set forth in *Blockburger v. United States*, 284 U.S. 299 (1932), because section 371 requires proof of an overt act while sections 963 and 846 do not. However, this analysis cannot withstand scrutiny. The test set forth in *Blockburger* is only a rule of statutory construction to help determine legislative intent. *Garrett v. United States*, 53 U.S.L.W. 4629, 4631 (June 3, 1985). It is not controlling when the legislative intent is clear from the face of the statute or the legislative history. *Missouri v. Hunter*, 459 U.S. 359, 368 (1983). In light of the canon of statutory construction that Congress is presumed to intend a specific conspiracy statute to replace, rather than to supplement, a general one, *Mori*, 444 F.2d at 245, I believe that the legislative

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[2]Congress made it easier to prove drug conspiracies by refusing to require proof of an overt act, and stiffened the penalties over those provided in the general conspiracy statute, thus indicating an intent to punish drug conspiracies more harshly than other types of conspiracies.

intent in this case is clear and that the test set forth in *Blockburger* does not control this decision.

Moreover, even if the *Blockburger* analysis is applied, I cannot believe that the requirement of proof of an overt act is sufficient, in the context of a conspiracy case, to satisfy the requirement of proof of an additional element. In the only two cases in which the Supreme Court has found congressional intent to create two offenses out of a single conspiracy, each statute required proof of a different *objective* of the conspiracy. *Albernaz*, 450 U.S. 333; *American Tobacco*, 328 U.S. 781. One interpretation of the conspiracy cases thus is that a single agreement cannot make the appellant guilty of as many offenses as the agreement has criminal objects, *Braverman*, 317 U.S. at 53, unless Congress has made conspiracy to commit those particular offenses specifically criminal, thus indicating its intent that the single conspiracy be considered more than one offense. *But see United States v. Barton*, 647 F.2d 224 (2d Cir.), *cert. denied*, 454 U.S. 857 (1981) (finding that 18 U.S.C. §1962(d) and 18 U.S.C. §371 constitute separate offenses because section 371 requires proof of an overt act and section 1962(d) does not).

Under the rule the majority sets forth, a conspiracy with only one objective—importation of drugs in violation of §952, for example—would constitute two offenses if one of the conspirators committed an overt act in furtherance of the conspiracy. In such a situation, proof that a defendant had violated section 371 would *necessarily* prove the violation of section 963 as well. As in *Ball v. United States*, 53 U.S.L.W. 4395, 4397 (March 26, 1985) (*quoting Albernaz*, 450 U.S. at 343), "[t]he independent, but overlapping statutes simply are not 'directed to

separate evils' under the circumstances." I cannot believe the Congress' decision not to require proof of an overt act in drug conspiracies indicates an intent to make one con-spiracy two offenses simply because an overt act has been commit-ted in furtherance of the conspiracy.

In deciding that the conspiracy statutes describe different offenses under the *Blockburger* test, the majority also relies on the fact that "[c]onviction on the §371 count requires proof of an element, intent to travel in interstate commerce," which the charges under the drug conspiracy statutes do not. Maj. Op. at 5. It is not clear whether the majority believes that this element is required by §371 itself, or whether it believes that, because the element is part of the crime as charged, it can be used to satisfy the *Blockburger* test even though it is not contained in the conspiracy statute itself. In either event, I cannot agree.

Section 371 itself makes no mention of travel in interstate commerce. Rather, proof of intent to travel in interstate comerce was required in this case only because 18 U.S.C. §1952(a)(3), the substantive statute which the appellants are charged with conspiring to violate, requires proof of travel in interstate commerce, so proof of conspiracy to violate section 1952(a)(3) requires proof of intent to commit that element of the underlying crime.

If the majority's statement reflects a belief that elements that are required, not by the conspiracy statute itself, but by the underlying statute which the appellants are charged with conspiring to violate are sufficient to satisfy the *Blockburger* test, their decision is inconsistent

with *Blockburger* itself. In *Blockburger*, the Supreme Court held that

> where the same act constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether *each provision* requires proof of a fact which the other does not.

284 U.S. at 304 (emphasis added). Since the appellants are charged with violating section 371, the focus of the *Blockburger* analysis must be on the elements required by section 371 itself. Because section 371 does not require proof of intent to travel in interstate commerce, that element cannot be used to satisfy *Blockburger's* requirement that each statutory provision require proof of a fact which the other does not.

The majority's approach would expand *Blockburger* in the context of conspiracy cases to allow consideration of the elements, not only of the conspiracy statute itself, but of whatever substantive statute the government has charged the appellants with conspiring to violate. The result of such an expansion would be that we would be required to find two separate offenses subject to separate punishment whenever the government charged, under two separate counts, conspiracy to violate two different substantive laws, so long as those substantive laws required proof of reciprocally different facts. Indeed, we would be required to do so even if the conspiracy charges were based on the same conspiracy statute, since the crimes *as charged* would require proof of reciprocally different facts. Such a result is

flatly inconsistent with *Braverman*, which the majority not only does not distinguish but totally fails to cite.

The defendants in *Braverman* were indicted on seven counts under section 37 of the Criminal Code, the predecessor to section 371. Although each count charged conspiracy to violate a separate and distinct internal revenue law, the Court found the multiple convictions to violate the double jeopardy clause since "it is the conspiracy which is the crime, however diverse its objects." 317 U.S. at 54 (quoting *Frohwerk v. United States*, 249 U.S. 204, 210). The constitutional impediment cannot be avoided simply by taking the diverse objects of the conspiracy and dividing them among different conspiracy statutes unless those statutes, *by themselves*, create separate offenses. As discussed, the single conspiracy can be punished more than once only when Congress has clearly indicated its intent to do so by enacting two conspiracy statutes which, in and of themselves, satisfy the test for creation of two separate offenses. Since, as discussed, I find that section 371 does not create a separate offense under either the statutory construction rules of *Mori* or under the *Blockburger* test, *Braverman* bars multiple punishment in this case.

Where Congress intended to create two different offenses, it is presumed that it intended to permit cumulative sentences. *Garrett v. United States*, 53 U.S.L.W. 4629, 4635 (June 3, 1985). However, where, as here, the statutory provisions proscribe the same offense, they have been construed not to authorize cumulative punishments in the absence of a clear indication of contrary legislative intent. *Missouri v. Hunter*, 459 U.S. 359, 366 (1983); *Whalen v. United States*, 445 U.S.

684, 691-92 (1980). Since we have no clear indication of congressional intent to punish drug conspiracies under both the specific and the general statutes, we must presume it did not intend cumulative punishment.

Since Congress did not intend to authorize cumulative punishment, multiple punishments for a single conspiracy violates the double jeopardy clause.

I would set aside the convictions under 18 U.S.C. §371 and remand for sentencing under the provisions of 21 U.S.C. §§963 and 846 in the case of appellant Engelhart, and 21 U.S.C. §963 and 18 U.S.C. §1952(a)(3) in the case of appellant Timberlake.

Supreme Court, U.S.
FILED
DEC 24 1985
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 85-747

In the Supreme Court of the United States

OCTOBER TERM, 1985

CHARLES LEROY TIMBERLAKE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that his sentence based upon a plea of guilty should be vacated because the charges of conspiracy to import cocaine under 21 U.S.C. 963 and conspiracy to violate the Travel Act under 18 U.S.C. 371 constitute a single offense.

1. Following indictment on six counts by a federal grand jury in the Eastern District of Oklahoma, petitioner pleaded guilty to one count (Count I) of conspiracy to import cocaine, in violation of 21 U.S.C. 963, one count (Count V) of conspiracy to travel in interstate and foreign commerce to promote an unlawful activity, in violation of 18 U.S.C. 371 and 1952(a)(3), and one count (Count VI) of traveling in interstate and foreign commerce to promote an unlawful activity, in violation of 18 U.S.C. 1952(a)(3). Petitioner was sentenced to 15 years' imprisonment on the drug importation conspiracy in Count I, a consecutive term of five years'

imprisonment on the Travel Act conspiracy in Count V, and a consecutive five-year term of imprisonment on the substantive Travel Act violation in Count VI.[1] Pursuant to the plea agreement, the government dismissed the remaining three counts in the indictment, which charged petitioner with importing cocaine, possessing cocaine with intent to distribute it, and conspiring to possess cocaine with intent to distribute it. The plea agreement contained no promises or understanding concerning the sentence that petitioner would receive (Pet. App. 2).

2. Petitioner was a co-defendant of Mitchell Skiff Engelhart, who has filed a petition for a writ of certiorari (No. 85-5473) to review the decision of the Tenth Circuit that disposed of the appeals of both defendants. The factual background and question presented in the two petitions are the same and are discussed in our brief in opposition to Engelhart's petition.[2] For the reasons there stated, further review is not warranted in either case.[3]

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[1]Petitioner challenges his sentences only on the conspiracy counts and not on the substantive Travel Act count.

[2]Review of Engelhart's petition would be especially unwarranted since he, unlike Timberlake, received concurrent sentences on the drug conspiracy and Travel Act conspiracy counts that he challenges.

[3]A copy of our opposition to Engelhart's petition is being sent to counsel for Timberlake.

We also note that the instant petition may have been untimely under Rule 20.1 of the Rules of this Court. The judgment of the court of appeals was entered on July 23, 1985, and the petition was filed on October 21, 1985. Since petitioner did not seek rehearing in the court of appeals, it appears that his petition for a writ of certiorari is out of time. While co-defendant Engelhart did seek rehearing of his appeal (see 85-5473 Pet. Apps. B, C), that would not seem to affect the time for Timberlake to file a petition for certiorari in his case. See Sup. Ct. R. 20.4. However, since Engelhart and Timberlake were co-defendants in the district court, and since the Tenth Circuit treated the two appeals together and disposed of them in one opinion, the application of Rule 20.4 is not entirely clear.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

DECEMBER 1985

DOJ-1985-12